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No. 73-16

SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

CHARLES H. MOGULNICKI
Petitioner

VS.

TROOPER ROBERT KELLER
AND
SERGEANT MORTON DENNERSTEIN
Criminal Intelligence Division
STATE OF CONNECTICUT
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinions of the District Court and the Court of Appeals, are not officially reported. The Court of Appeals decision (Case No.

73-1406) is reproduced, substantially correctly, in the petitioner's Appendix. The District Court opinion (Case No. 14788), contrary to petitioner's assertion, does not appear in petitioner's Appendix, as hereinafter discussed.

JURISDICTION

The petitioner has cited no statutory jurisdictional basis. None exists for a writ from the District Court. Also, none of the suggested bases in Rule 19, Rules of the Supreme Court of the United States, are presented in this matter, there are no significant issues to be presented, and there are no special or important reasons for granting review.

QUESTIONS PRESENTED

The Petitioner presents four questions under the heading: "Principal Issues". The actual question presented is: If a valid affirmative defense bars an action, is summary judgment for the defendant proper?

CONSTITUTIONAL PROVISIONS

Petitioner fails to cite any Constitutional provisions. Upon the questions presented, none are directly involved.

STATEMENT OF THE CASE

This is an action by the plaintiff-Petitioner for damages arising out of his arrest and conviction for pool-selling. The defendants-Respondents, are two Connecticut

State Police Officers, sued in their representative capacity only. The Petitioner complains of warrantless arrest, search and seizure. The action was filed on December 15, 1971 in the United States District Court, District of Connecticut.

Following the filing of an Answer and Discovery procedures, the plaintiff-Petitioner moved for Summary Judgment. The defendants-Respondents filed a Cross-Motion for Summary Judgment. After memoranda were filed, oral argument was heard, and the District Court, on January 16, 1973, rendered a decision granting the defendants' cross-motion. On January 18, 1973, Judgment entered in favor of the defendants. The plaintiff moved for an amended judgment, which motion was denied on February 13, 1973. Thereafter the plaintiff-Petitioner appealed to the Court of Appeals, Second Circuit, which appeal was dismissed upon defendants'-Respondents' motion, for lack of prosecution, on April 10, 1973. Petitioner's Motion for Rehearing was denied on May 7, 1973. The plaintiff-Petitioner has now filed petitions to this Court for certiorari.

ARGUMENT

A. Propriety of Questions Raised

Petitioner received an adverse decision in the District Court. His appeal was dismissed. That dismissal was discretionary and should not be reviewed. Petitioner does not attack the dismissal. Unless the Circuit Court dismissal was improper, the doings of

the District Court are not properly before this Court, and thus also should not be reviewed.

B. Supreme Court Rules - Petition Contents

The Rules of this Court are specific as to the content of the document upon which a petition for writ of certiorari is considered. The requisite content of a Petition for Certiorari is set out in Rule 23. Petitioner has not complied with the rule.

As filed, the Petitioner fails to state a basis for jurisdiction, in that it fails to cite a statutory provision providing jurisdiction; [Rule 23(b)(iii)]; it fails to properly set forth the constitutional provisions and statutes involved [Rule 23(c)]; no basis for federal jurisdiction in the first instance is shown [Rule 23 (g)]; no direct and concise argument amplifying the reasons relied on for allowance of the writ, with regard to Rule 19, is provided [Rule 23(h)]; and the Appendix is incomplete, [Rule 23(i)].

All opinions sought to be reviewed must be appended. Rule 23(i). Petitioner has printed what purports to be the District Court Opinion. What the ruling of the District Court, found at pages 1a of Petitioner's Appendix is, however, is selected excerpts from that opinion, some paraphrased and some quoted. [Specifically: paragraph one is a paraphrase of paragraph one, page one, of the District Court's Ruling; paragraph two is a partial quote of a portion of pages three to four; paragraph three is a fairly accurate quote of a portion of page five; paragraph four is a brief quote from

page six; and paragraph five is a partial quote of the last paragraph of page seven.] The Court of Appeals Ruling is a reasonably accurate reproduction.

C. Questions Not of Reviewable Nature

The Petitioner raises four "Principal Issues". The first raises the propriety of the District Court's denial of Petitioner's Motion for Summary Judgment and granting of the Respondents' cross-motion; the second asks whether the denial of summary judgment and the judgment entered were "with prejudice"; third, is whether the Court of Appeals dismissal was "with prejudice"; and fourth is whether Respondents' defenses were valid.

The first and fourth issues as stated are really the same. The Respondents interposed two affirmative defenses; res adjudicata and collateral estoppel; and the applicable statute of limitations, Connecticut General Statutes, §§ 52-584 or 52-577. The District Court found each defense to be a valid bar, and thus granted the cross-motion for summary judgment. Petitioner's Motion for Summary Judgment was denied for two reasons: first, the affirmative defenses were absolute bars; and second, the Petitioner failed to show lack of probable cause for the arrest.

As to res adjudicata and collateral estoppel, the Petitioner, in the criminal action resulting from the arrest which is the basis for this action, raised the same issues of warrantless arrest, search and seizure as in

this action at every judicial step open to him, all to no avail. Those steps were: Motion to Dismiss before the Connecticut Circuit Court; appeal to the Appellate Division of the Circuit Court; Petition for Certification to the Connecticut Supreme Court; Petition for Certiorari to the United States Supreme Court; Motion for Rehearing to the United States Supreme Court; and, upon incarceration, Writs of Habeas Corpus to the District Court, the Court of Appeals, and the United States Supreme Court. The Circuit Court upheld the arrest, search and seizure, the Appellate Division affirmed, and the Connecticut Supreme Court and the United States Supreme Court declined review. All Writs of Habeas Corpus were denied. Clearly, there is no reviewable issue raised by the District Court's holding, based upon Kaufman v. Moss, 420 F. 2d 1270, 1274 (3 Cir. 1970), cert. denied, 400 U. S. 846 (1970), that this action by the criminal defendant against agents of the state, is barred by res adjudicata and collateral estoppel.

As to the statute of limitations, the maximum period allowed is three (3) years. The arrest, search and seizure took place on December 4, 1967. This action was commenced on December 15, 1971. The time lapse was just over four (4) years. Well beyond the three year statutory limit. Again, clearly no significant issue is raised by the District Court's holding that this action is barred by Connecticut General Statutes, § § 52-584 and 52-577. Petitioner's reliance on the Connecticut fraudulent concealment statute, § 52-595 is clearly incorrect as in-

dicated by his claims in the criminal action from the very beginning, and no reviewable issue is raised thereby.

As to the other two issues raised, the answers are apparent, and patently insufficiently significant. Judgment entered in the District Court against the plaintiff (Petitioner). That judgment is final, and clearly "with prejudice". The dismissal by the Court of Appeals was clearly "with prejudice" since on both the original motion and the Motion for Rehearing the option was available to order corrective measures rather than dismissal. In any event, the question is not such as to warrant review by this Court.

CONCLUSION

The Petition fails "to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration", [Rule 23(4)]; in that it omits all arguments, jurisdictional statements and claims, and does not present the full decision protested. That failure alone is "sufficient reason for denying his petition." Id. Further, none of the questions raised are of the nature suggested by Rule 19, and thus no review is in order. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Counsel for Respondents